LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JAN 8 1972
CLERK

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-247

WILLIAM RABE,
Petitioner,

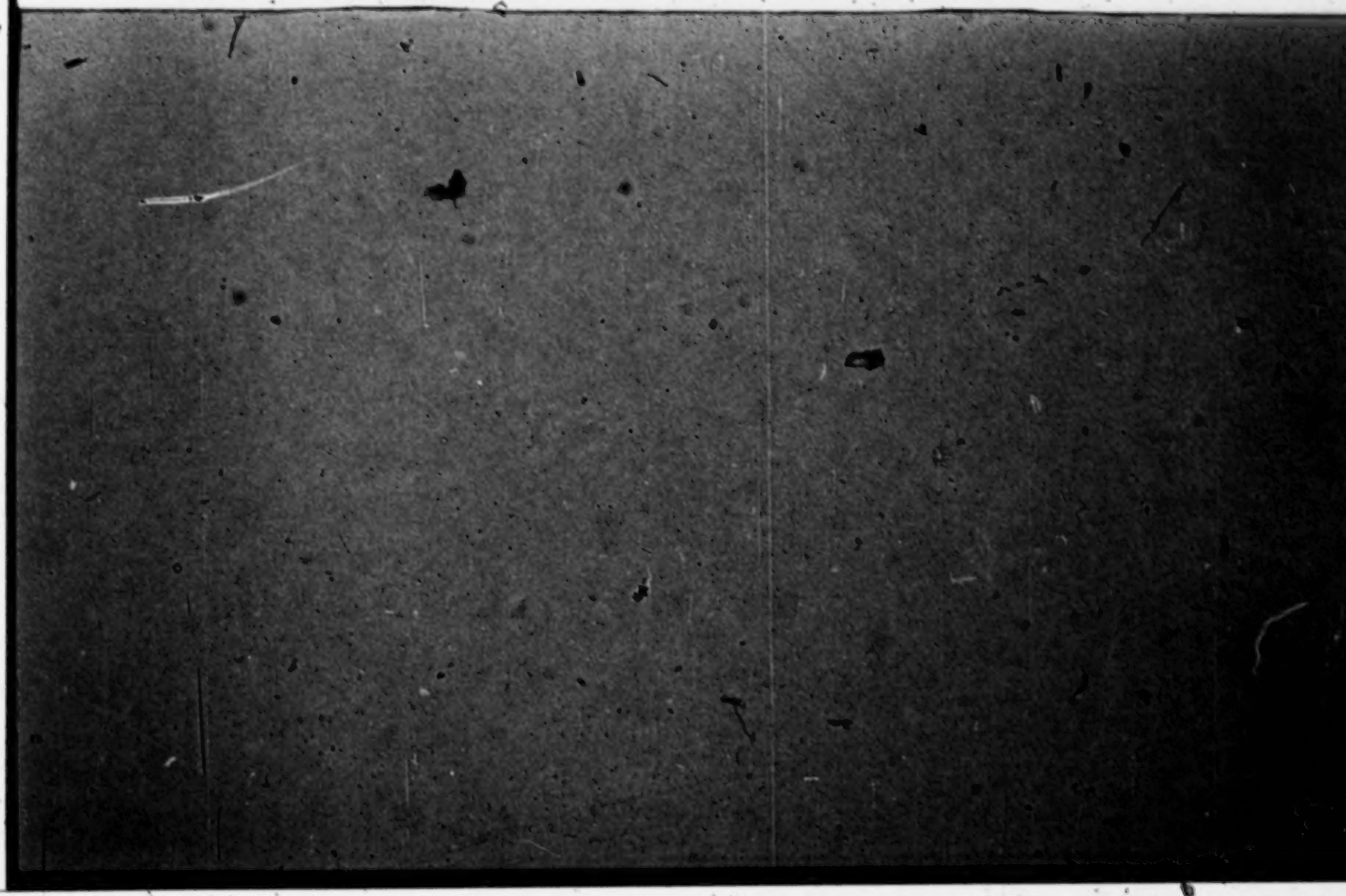
v.

STATE OF WASHINGTON,
Respondent.

BRIEF OF RESPONDENT

HERBERT H. DAVIS
Prosecuting Attorney for Benton County
CURTIS LUDWIG
Deputy Prosecuting Attorney for Benton County
P. O. Box 510
Prosser, Washington 99350
Counsel for Respondent

printGraphics, Inc. Pasco, Wash.



SUBJECT INDEX

	Page
Table of Authorities	ii, iii, iv
Constitutional and Statutory Provisions Involved	1
Counter-Statement of the Case	3
Summary of Argument	6
Argument	7
I A motion picture with a dominant theme appealing to a prurient interest in sex when shown outdoors and foisted off on unwilling viewers is subject to the state's obscenity statute and criminal prosecution may consider the use, setting and manner of display	7
II Right of privacy may be protected from an outdoor display of an arguably obscene movie without infringing on First Amendment rights	14
III Seizure of a single copy of a film as evidence in a criminal trial does not require a prior adversary hearing and distinction exists between seizure aimed at suppression and seizure aimed at obtaining evidence of the crime charged	16
Conclusion	23

TABLE OF AUTHORITIES

Table of Cases

	Page
A Book v. Attorney General of Massachusetts 383 U.S. 413 (1966)	9
A Quantity of Books v. Kansas 378 U.S. 205 (1964)	17, 18, 19
Bazzell v. Gibbens 306 F. Supp. 1057 (E.D. La. 1969)	19
Bethview Amusement Corp. v. Cahn 416 F. 2d 410 (2d Cir. 1969)	18, 19
Breard v. Alexandria 341 U.S. 622 (1951)	9
Butler v, Michigan 352 U.S. 380 (1957)	9
Byrne v. Karalexis 401 U.S. 216 (1971)	22
Cohen v. California 403 U.S. 15 (1971)	15
Entertainment Ventures, Inc. v. Brewer 306 F. Supp. 802 (M.D. Ala. 1969)	19
Freedman v. Maryland 380 U.S. 51 (1965)	11, 22
Ginzburg v. United States 383 U.S. 463 (1966)	9, 11
Griswold v. Connecticut 381 U.S. 479 (1965)	6, 12, 14
Joseph Burstyn, Inc. v. Wilson 343 U.S. 495 (1952)	11

Kingsley Books, Inc. v. Brown
354 U.S. 436 (1957) 11

Landau v. Fording
245 Cal. App. 2d 820, 54 Cal. Rptr. 177 (1966) aff'd per curiam 388 U.S. 456 (1967) 10

Lee Art Theatre, Inc. v. Virginia
392 U.S. 636 (1968) 6, 7, 17, 20, 21

Marcus v. Search Warrants of Property
367 U.S. 717 (1961) 16, 17

Merritt v. Lewis
309 F. Supp. 1249 (E.D. Cal. 1970) ... 19

Metzger v. Pearcy
393 F. 2d 202 (7th Cir. 1968) 18, 20

Mishkin v. New York
383 U.S. 502 (1966) 11

New York v. Heller
New York Law Journal December 16, 1971 19

Prince v. Commonwealth of Massachusetts
321 U.S. 158 (1944) 9

Public Utilities Comm'n v. Pollack
343 U.S. 451 (1952) 9

Rage Books, Inc. v. Leary
301 F. Supp. 546 (S.D. N.Y. 1969) ... 19

Redrup v. New York
386 U.S. 767 (1967) 8, 9, 14

Roth v. United States
354 U.S. 476 (1957) 7, 8, 11, 13, 20

Table of Cases — Continued

Stanley v. Georgia
394 U.S. 557 (1969) 9, 11, 14

United States v. Petrillo
332 U.S. 1 (1947) 13

United States v. Reidel
— U.S. —, 28 L. Ed. 2d 813, 91 S. Ct.
1410 (1971) 9

United States v. Thirty-Seven Photographs
— U.S. —, 28 L. Ed. 2d 822 (1971) 22

Constitutional Provisions

United States Constitution

Amendment I 1, 8, 10, 11, 12, 20

Amendment V 1, 18

Amendment IX 2, 12, 14

Statutes

Laws of Washington 1961 Chap. 146, Sec. 1 2

RCW 9.68.010 ..... 2, 3, 4, 5, 6, 12, 13, 15

Other Authority

Report of the Commission on Obscenity and
Pornography 11

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-247

WILLIAM RABE,
Petitioner,

v.

STATE OF WASHINGTON
Respondent.

BRIEF OF RESPONDENT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the

Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment IX:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Laws of the State of Washington, 1961, Ch. 146, Sec. 1, codified as Sec. 9.68.010, page 153, Title A, Revised Code of Washington Annotated:

9.68.010 Obscene literature, shows, etc. Every person who —

(1) Having knowledge of the contents thereof shall exhibit, sell, distribute, display for sale or distribution, or having knowledge of the contents thereof shall have in his possession with the intent to sell or distribute any book, magazine, pamphlet, comic book, newspaper, writing, photograph, motion picture film, phonograph record, tape or wire recording, picture, drawing, figure, image, or any object or thing which is obscene; or

(2) Having knowledge of the contents thereof shall cause to be performed or exhibited, or shall engage in the performance or exhibition of any show, act, play, dance or motion picture which is obscene;

Shall be guilty of a gross misdemeanor.

COUNTER — STATEMENT OF THE CASE

On August 30, 1968, William Rabe was arrested by Richland police officers under the authority of a warrant issued by Justice of the Peace Albert J. Yencopal (App. 10) based on an alleged exhibition of an obscene motion picture. At the time of the arrest and incidental thereto, the Richland police officers seized the movie film "Carmen Baby" as evidence of the crime charged.

At the time of his arrest, William Rabe was the manager of the Park Y Drive-In Theatre. He had been once previously arrested on a citizen's complaint for a similar offense involving a motion picture entitled "The Notorious Daughter of Fanny Hill". The previous case was disposed of by an Order allowing bail forfeiture (App. 28) and a return of the seized film.

Prior to issuance of the warrant, a Richland police sergeant testified during a hearing conducted by Justice of the Peace Albert J. Yencopal, concerning various scenes of the movie "Carmen Baby" which was then playing at the Park Y Drive-In Theatre located in a residential area of Richland, Washington, where the theater screen is viewable from twelve to fifteen residences.

The purpose of the hearing was to determine if there was probable cause for the issuance of an arrest warrant for the manager of the drive-in theater (App. 8) for violation of Section 9.68.010, Revised Code of Washington, which provides:

> 9.68.010 Obscene literature, shows, etc. Every person who —

(1) Having knowledge of the contents thereof shall exhibit, sell, distribute, display for sale or distribution or having knowledge of the contents thereof shall have in his possession with the intent to sell or distribute any book, magazine, pamphlet, comic book, newspaper, writing, photograph, motion picture film, phonograph record, tape or wire recording, picture, drawing, figure, image, or any object or thing which is obscene, or

(2) Having knowledge of the contents thereof shall cause to be performed or exhibited, or shall engage in the performance or exhibition of any show, act, play, dance or motion picture which is obscene;

Shall be guilty of a gross misdemeanor.

At the hearing, only a portion of which was transcribed (App. 13), Justice of the Peace Yencopal, judicially scrutinized the complainant about the movie (App. 13), in a procedure "designed to focus searchingly on the question of obscenity" (App. 14). The police sergeant had previously viewed a portion of the movie on August 28, 1968, from outside the chain link fence enclosing the theater and practically the entire movie on August 29, 1968 (App. 8), from outside the theater in the company of the city attorney.

Upon a finding of probable cause an arrest warrant was issued and executed with the arrest of petitioner.

The following is a chronological summary of the proceedings in Justice Court:

(1) On September 3, 1968, petitioner appeared in Justice Court with his counsel and entered a plea of not

guilty along with a motion to dismiss which was taken under advisement (App. 26).

(2) On September 6, 1968, the case was continued without objection to September 13, 1968 (App. 27).

(3) On September 13, 1968, the motion to dismiss was denied (App. 27).

(4) On September 19, 1968, petitioner filed a motion to suppress (App. 11) which was followed by supporting and opposing briefs.

(5) Justice of the Peace Yencopal denied the motion to suppress by written Order dated September 27, 1968 (App. 12-15).

(6) Trial was held October 3, 1968, before Justice of the Peace Yencopal sitting without a jury (App. 27).

(7) On October 7, 1968, Justice of the Peace Yencopal entered his written decision (App. 16-25), finding the petitioner guilty of a violation of RCW 9.68.010.

Subsequently, petitioner gave notice of appeal and the appeal process followed with a trial de novo in Superior Court resulting in petitioner's conviction based on the context of the movie's exhibition. On appeal the Supreme Court of the State of Washington affirmed.

SUMMARY OF ARGUMENT

1. The display of an arguably obscene movie film at an outdoor theater in close proximity and in view of private residences is an obtrusive display and obscene in the context of its exhibition. Such a display is subject to the criminal sanctions of the state's obscenity statute, RCW 9.68.010, and criminal prosecution does not require an abstract determination of the obscenity *vel non* of the movie but may consider the use, setting and manner of display in determining whether it is obscene in such a context. The application of the state's obscenity statute in this manner does not inhibit expression or eliminate the film from display but merely restricts its showing in the particular setting of a drive-in theater with a theater screen visible from outside the theater.

2. Right of privacy does not depend on statute for its existence. It is a right "created by several fundamental constitutional guarantees", *Griswold v. Connecticut,* 381 U.S. 479, 485 (1965). In the context of its exhibition at an outdoor theater the motion picture "Carmen Baby" is obscene. The application of the state's obscenity statute, RCW 9.68.010, imposing criminal sanction for displaying an arguably obscene movie in such a setting does not deny due process of law.

3. The decision in *Lee Art Theatre, Inc. v. Virginia,* 392 U.S. 636 (1968), indicates the sole requirement for seizure of film as evidence is a "'procedure 'designed to focus searchingly on the question of obscenity' ".

Equating the seizure of one copy of a film to a "mas-

sive seizure" is unrealistic and impractical. A distinction exists between a seizure aimed at suppression and a seizure aimed at obtaining evidence for use in a criminal trial. The nature and purpose of the seizure should determine if a prior adversary hearing is required. The procedures followed by the justice of the peace prior to seizure of the film "Carmen Baby" were consistent with the requirements of *Lee Art Theatre.*

ARGUMENT

I

A MOTION PICTURE WITH A DOMINANT THEME APPEALING TO A PRURIENT INTEREST IN SEX WHEN SHOWN OUTDOORS AND FOISTED OFF ON UNWILLING VIEWERS IS SUBJECT TO THE STATE'S OBSCENITY STATUTE AND CRIMINAL PROSECUTION MAY CONSIDER THE USE, SETTING AND MANNER OF DISPLAY

Petitioner questions whether he should be convicted under an obscenity statute when a movie containing numerous erotic scenes is exhibited by him in a drive-in theater in a manner permitting unwitting and unwilling persons to view portions out of context.

While the Superior Court did not make an abstract finding regarding the obscenity *vel non* of the movie as a whole and that question was not directly before the Supreme Court of Washington, the opinion indicates only a probability that it would pass the definitional test of obscenity enunciated in *Roth v. United States,* 354 U.S. 476 (1957). The justice of the peace who pre-

sided over the original trial did hold that the movie as a whole was obscene and that its dominant theme appealed to a prurient interest in sex (App. 24), described by the justice of the peace as follows:

> "Look at the numerous sex scenes. First the fondling of the breast, the fondling of the policeman's genitals, the naked (man) and woman in bed, and not husband and wife, the lengthy vivid and precise portrayal of every move — and from close up of the sex scene in bed when Carmen orally copulated the policeman and then a later scene when he did the same to her . . . the dance around the bottle wherein she masterbated (sic) herself . . . the lesbian scene with the wife of the parole board officer . . . all in fine and minute and closeup detail . . . and the act of sex intercourse which was taken through colored glasses and took about five minutes to portray . . . and numerous other short scenes . . ." (App. 24)

Likewise, at least one Justice of the Supreme Court of Washington would also hold the movie to be obscene under the definition of *Roth* (App. 101). The opinion of the Court while deciding that "the dominant theme of the motion picture appeals to the prurient interest" (App. 90), apparently withheld an abstract ruling on the obscenity *vel non* only because of the requirement that it be "utterly without redeeming social value".

Accordingly, in the *context* of its exhibition in a drive-in theater it was considered obscene (App. 90).

The judgment of the Washington Court does not infringe on the freedom of speech guarantee of the First and Fourteenth Amendments. It is a proper reliance on *Redrup v. New York*, 386 U.S. 767, 769 (1967), which stated:

"In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S.Ct. 438 88 L. Ed. 645; cf. Butler v. State of Michigan, 352 U.S. 380, 77 S.Ct. 524, 1 L. Ed. 2d 412. *In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.* Cf. Breard v. City of Alexandria, 341 U.S. 622, 71 S.Ct. 920, 95 L. Ed. 1233; Public Utilities Comm'n of District of Columbia v. Pollak, 343 U.S. 451, 72 S.Ct. 813, 96 L. Ed. 1068. And in none was there evidence of the sort of 'pandering' which the Court found significant in Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 942, 16 L. Ed. 2d 31." (Emphasis added)

The language quoted does not suggest that a separate statute is required for obtrusive displays as it does in the case of a concern for juveniles.

The holding of *Redrup, supra,* was reaffirmed in *Stanley v. Georgia,* 394 U.S. 557 (1969) and approved in *United States v. Reidel,* — U.S. —, 28 L. Ed. 2d 813 91 S. Ct. 1410 (1971) (concurring opinion by Mr. Justice Marshall.)

The same consideration of the context in which a work is exhibited was expressed by this Court in *A Book v. Attorney General of Massachusetts,* 383 U.S. 413, 420 (1966) where Mr. Justice Brennan speaking for the Court stated:

"It does not necessarily follow from this reversal that a determination that *Memoirs* is obscene in the constitutional sense would be improper under all

> circumstances . . . the circumstances of production, sale, and publicity are relevant in determining whether or not the publication or distribution of the book is constitutionally protected . . . In this proceeding, however, the courts were asked to judge the obscenity of *Memoirs* in the abstract, and the declaration of obscenity was neither aided nor limited by a specific set of circumstances of production, sale and publicity."

The case herein involves a drive-in theater exhibition which illuminates the nighttime sky of a residential area with a vivid portrayal of erotic sexual scenes. Surely in this context the exhibition is obscene and loses the protection of the First and Fourteenth Amendments and any claim that the obscenity must be judged on the film as a whole. This application of the obscenity statute does not inhibit expression or restrict and eliminate this film from display — but merely restricts its showing in a drive-in theater located as is the Park Y Drive-In Theatre. Petitioner also urges that judgment of the film without the accompanying sound track unfairly removes whatever redeeming social value the film might possibly possess. But that is precisely the way it is being disseminated and viewed by those outside the theater enclosure.

The decision that the film "Carmen Baby" is obscene in the context of its display at a drive-in theater rests on sound legal principles and precedent. Particularly when we consider "that because of visual impact of motion pictures, motion pictures of sexual scenes may transcend the bounds of constitutional guarantee long before a frank description of the same scenes in written words". *Landau v. Fording,* 245 Cal. App. 2d 820, 54

Cal. Rptr. 177 (1966), *aff'd per curiam,* 388 U.S. 456 (1967); and "that films differ from other forms of expression". *Freedman v. Maryland,* 380 U.S. 51, 61 (1965). These principles had previously been established in *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495 (1952) where Justice Clark speaking for the Court stated:

> "To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. * * * Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression."

Numerous other decisions of this Court and views of its members support the proposition that the setting in which a material is placed and the context in which it is displayed or viewed are relevant to the determination of obscenity. *Ginzburg v. United States,* 383 U.S. 463 (1966), *Stanley v. Georgia,* 394 U.S. 557 (1969); *Kingsley Books, Inc. v. Brown,* 354 U.S. 436 (1957) (dissenting opinion of Chief Justice Warren); *Roth v. United States,* 354 U.S. 476 (1957) (concurring opinion of Chief Justice Warren); *Ginzburg v. United States, supra,* (dissenting opinion of Mr. Justice Stewart and note 1 at 498); *Mishkin v. New York,* 383 U.S. 502 (1966).

Even the often criticized Commission on Obscenity and Pornography while advocating a removal of most

obscenity statutes recognizes a need for restrictions on public displays of obscenity. *Report of the Commission on Obscenity and Pornography,* Part Two Recommendations of the Commission, Sec. II, C, states in part:

> "The Commission's recommendations in this area are based upon its findings, through its research, that certain explicit sexual materials are capable of causing considerable offense to numerous Americans when thrust upon them without their consent."

The right of individuals within their own homes and neighborhoods to be protected from a blatant and obtrusive display is paramount to the theater's right to display on a large outdoor screen, an arguably obscene movie. The individual's right of privacy is a fundamental constitutional right within the protection of the Bill of Rights and the meaning of the Ninth Amendment which provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." See *Griswold v. Connecticut,* 381 U.S. 479 (1965). The instant case involves a balance between competing rights of the individual. The application of the Washington obscenity statute, RCW 9.68.010, to prohibit this type of problem does not amount to a suppression of the film nor does it unduly restrict the producer's First Amendment right of expression. It merely restricts the exhibition of this film in a manner involving an obtrusive display. The film may still be produced and displayed to willing individuals in an indoor theater. It has in fact, subsequently been exhibited in an indoor theater in Benton County, Washington.

The state obscenity statute, RCW 9.68.010, as applied in this case is neither vague nor overboard. It proscribes the exhibition of obscene motion pictures and in the context of the particular display the film "Carmen Baby" was held to be obscene (App. 90). See *Roth, supra,* where at page 491, Mr. Justice Brennan speaking for the Court stated:

> "Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirement of due process. '* * * (T)he Constitution does not require impossible standards': all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices * * *.' United States v. Petrillo, 332 U.S. 1, 7-8, 67 S.Ct. 1538, 1542, 91 L. Ed. 1877. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '* * * boundaries sufficiently distinct for judges and juries fairly to administer the law * * *. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense * * *.'"

The obscenity statute gives sufficient warning to men of common intelligence and there is ample guidance for the producer and exhibitor. The movie industry imposes upon itself a rating system and when movies are given an X rating or limited to adults only, it is ample notice that they should not be displayed outdoors blatantly and obtrusively.

II

RIGHT OF PRIVACY MAY BE PROTECTED FROM AN OUTDOOR DISPLAY OF AN ARGUABLY OBSCENE MOVIE WITHOUT INFRINGING ON FIRST AMENDMENT RIGHTS

There is no authority for the proposition that the right of privacy exists only if established by statute as petitioner implies. In reliance on *Griswold v. Connecticut, supra,* the court below has determined that "the right of privacy is enshrined as a constitutional doctrine" (App. 96). This fundamental right would seem to be the foundation of this Court's decision in *Stanley v. Georgia,* 394 U.S. 557 (1969). And *Redrup, supra,* obviously recognized this fundamental right. *Griswold, supra,* very clearly defines the right of privacy as one protected by the Bill of Rights and one of those rights retained by the people within the meaning of the Ninth Amendment.

Neither is there any authority indicating that a special statute need be enacted to protect an unwilling individual from a blatant or obtrusive display of a movie which has a dominant theme appealing to the prurient interest in sex. *Redrup* did not suggest such a statutory requirement as it clearly did in the case of a state's concern for juveniles. The opinion of the Washington Court held that the dominant theme of the movie "Carmen Baby" appeals to the prurient interest (App. 90), and in the context of its open exhibition in close proximity to homes and highways it lost whatever redeeming social value, if any, it had. In that context it was obscene and subject to the criminal sanctions of

Washington's obscenity statute, RCW 9.68.010.

Petitioner also questions whether there was an actual assault on individual privacy contending the record shows no complaints. The trial court recognized the obvious from the location of the screen and the proximity of the houses. The complaint was made by a police sergeant who first observed the film while driving by the drive-in theater and who is no less a resident of his community than others. The record before the justice court and superior court included the fact that the previous case involving petitioner resulted from a complaint of a private citizen as set out in the Order permitting forfeiture which was attached to the transcript on appeal from justice court (App. 28), and thus became a part of the record. Furthermore, having once made a complaint of this type, those residents had a right to rely on their police officers to properly enforce the law as Sergeant Gordon did on behalf of the community he represents.

Petitioner argues that the rule announced in *Cohen v. California,* 403 U.S. 15 (1971), is applicable to this case. However, a reading of *Cohen* clearly indicates that it is distinguishable from the case herein. In *Cohen,* this Court specifically pointed out that it was not an obscenity case and stated:

> "... this case cannot be said to fall within those relatively few categories of instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed. This is not, for example,

an obscenity case. Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. Roth v. United States, 354 U.S. 476. . ."

Cohen also recognized a distinction between an unwitting viewer outside his home and one within the privacy of his home. It was the residents within their own homes that the court below correctly considered in reference to the obtrusive assault on their individual privacy.

III

SEIZURE OF A SINGLE COPY OF A FILM AS EVIDENCE IN A CRIMINAL TRIAL DOES NOT REQUIRE A PRIOR ADVERSARY HEARING AND DISTINCTION EXISTS BETWEEN SEIZURE AIMED AT SUPPRESSION AND SEIZURE AIMED AT OBTAINING EVIDENCE OF THE CRIME CHARGED.

The Washington State Supreme Court has carefully and thoroughly reviewed the decisions pertaining to the procedures necessary to seize allegedly obscene material for evidentiary purposes. Their opinion (App. 83-88) recognizes and appreciates a distinction various other lower courts have been unwilling to acknowledge. That is, a distinction between seizures aimed at suppression or "prior restraint" and seizures aimed at obtaining evidence for use in a criminal prosecution.

The decisions of this Court considering this particular question are *Marcus v. Search Warrants of Prop-*

erty, 367 U.S. 717 (1961); *A Quantity of Books v. Kansas,* 378 U.S. 205 (1964), and *Lee Art Theatre, Inc. v. Virginia,* 392 U.S. 636 (1968). In *Marcus,* officers seized approximately 11,000 copies of 280 different publications with a search warrant under Missouri procedures authorizing seizure preliminary to destruction. In *A Quantity of Books* there was a seizure of 1,715 copies of 31 novels with a search warrant issued under a Kansas statute authorizing seizure and then after determination of obscenity, destruction by burning. Both *Marcus* and *A Quantity of Books* were civil proceedings against the materials and cases aimed at suppression involving a prior restraint without a determination of the obscenity question before seizure. In *Marcus* the procedures were held unconstitutional because they were not "designed to focus searchingly on the question of obscenity". In *A Quantity of Books* the Court held the procedures were as deficient as in the case of *Marcus,* adding that only a prior adversary hearing could fulfill the requirement of a "searching" inquiry into the question of obscenity as required by *Marcus.*

The *Lee Art Theatre* case involved seizure of a motion picture for use as evidence under authority of a warrant issued on the conclusory affidavit of a police officer and the *per curiam* opinion did not say that seizure of a motion picture required a prior adversary hearing and only held that the seizure must be proceeded by a judicial inquiry "designed to focus searchingly on the question of obscenity".

Some circuit courts have considered this question and

ruled on the basis of the Court's opinion in *A Quantity of Books*. The first of these was *Metzger v. Pearcy*, 393 F. 2d 202 (7th Cir. 1968), which involved the seizure of four copies of a single motion picture film. While the circuit court affirmed a district court Order enjoining interference with the exhibition of the motion picture film, it did recognize the need for evidence in a criminal prosecution and ordered delivery to the prosecuting attorney of one print of the film for use in trial or preparation for trial. The difference between seizure of four copies of the film and one copy as evidence again points out the distinction between seizure aimed at suppression or "prior restraint" and a seizure aimed at evidence for use in trial. Respondent believes *Metzger* misconstrued *A Quantity of Books* which was in a very true sense a suppression case involving prior restraint and not necessarily applicable to motion pictures. At least three of the circuit courts have followed the procedure in *Metzger* and have ordered delivery of one copy of the motion picture film to the prosecution for use as evidence in trial. *Bethview Amusement Corp. v. Cahn*, 416 F. 2d 410 (2d Cir. 1969) suggests other alternatives to seizure such as a subpoena duces tecum or an order to show cause. Both of these alternatives clearly violate Fifth Amendment rights against self incrimination and these various decisions fail to explain how the suppression would be any less with a court ordered delivery of a film than it would be when a film is seized by the officers for use in criminal prosecution. These various alternatives suggesting an order to show cause or a subpoena duces tecum while overlooking the possibility that the defendant may refuse on the basis of his

Fifth Amendment right against self incrimination also overlook the fact that the film may have subsequently been removed from the jurisdiction or even edited to remove objectionable parts.

The better rule would seem to be that whether or not such a hearing is required depends on the nature and purpose of the seizure. The inconsistent suggestions and decisions of the various lower courts are the result of trying to apply the suppression or "prior restraint" cases like *A Quantity of Books* to motion picture cases involving a single copy of a film as evidence in a criminal trial. The more plausible and consistent view is expressed in *New York v. Heller,* (decided December 1, 1971) N. Y. Law Journal December 16, 1971, which held that a prior adversary hearing is not required indicating that "there are intrinsic procedural difficulties in requiring such hearings." See also *Bazzell v. Gibbens,* 306 F. Supp. 1057 (E.D. La. 1969); *Rage Books, Inc. v. Leary,* 301 F. Supp. 546 (S D. N. Y. 1969); *Entertainment Ventures, Inc. v. Brewer,* 306 F. Supp. 802 (M.D. Ala. 1969), and *Merritt v. Lewis,* 309 F. Supp. 1249, (E.D. Cal. 1970).

It has also been suggested in lower court decisions such as *Bethview Amusement Corp., supra,* that the suppression in the case of a single copy of a film is just as significant because of the large number of individuals which might view a film thereby indicating that preventing a large number of people from viewing a film is no different than preventing a similarly large number of books from being circulated. This reasoning

also fails to explain how the procedure of *Metzger* requiring a delivery of the film is any less of a suppression than a seizure of one copy of a film for evidentiary purposes.

This Court's only direct pronouncement regarding seizure of motion pictures for evidence was the *per curiam* opinion of *Lee Art Theatre* which did not state that a prior adversary hearing was necessary, but while recognizing First Amendment safeguards, did hold that seizure must be proceeded by a judicial inquiry "designed to focus searchingly on the question of obscenity". The opinion recognized the problems peculiar to motion pictures in determining "that a judge may read a copy of a book in a court room or chambers but not as easily arrange to see a motion picture there". The procedures followed in the instant case clearly meet the constitutional safeguards and requirements of *Lee Art Theatre*. Justice of the Peace Yencopal who conducted the inquiry has indicated:

> "Even though I followed the procedures formulated by the Supreme Court, I was not aware of them at the time I did this. I did this on my own initiative — so as not to consider lightly charges made involving matters normally guaranteed under the free speech amendment. I did *judicially scrutinize* the complainant about the movie before I issued the warrant. I did this in light of determining if there was probable cause to make an arrest for showing an obscene movie — *obscene as defined by the Supreme Court in Roth v. United States*, 354 U.S. 476 . . . the purpose of the probable cause hearing was a procedure designed to focus searchingly on the question of obscenity." (App. 13) (Emphasis added)

The justice of the peace did not accept the mere conclusions of the officer nor merely an affidavit from him but rather took testimony regarding various scenes of the movie and its content during a hearing, only part of which was transcribed. The justice of the peace indicated in his Order Denying the Motion to Suppress some of the other scenes about which Sergeant Gordon testified (App. 13).

Justice of the Peace Yencopal was also cognizant of the contextual setting in which the film was being displayed as is apparent from his ruling in petitioner's previous case where bail forfeiture was permitted. As the ultimate decision rested on a finding of obscenity in the context of the film's use and display the judge's initial inquiry prior to issuance of the warrant properly included a consideration of the outdoor display. The Superior Court Judge recognized this same consideration when he also denied the motion to suppress (App. 32).

The decisions of this Court do not support petitioner's contention that a full adversary hearing is necessary prior to seizure of a motion picture film for evidentiary purposes. Such a requirement would as Justice Harlan has stated: "Make adjudication not merely 'not as easily arranged' in the case of movies but quite impossible". *Lee Art Theatre, supra,* (dissenting opinion). There is even less reason for an adversary hearing in a case involving an outdoor display.

Petitioner also argues that the length of time this

film has been impounded is a restraint of First Amendment rights, citing *United States v. Thirty-Seven Photographs*, — U.S. —, 28 L. Ed. 2d 822 (1971). Petitioner fails to recognize that his case was tried by the justice court on October 3, 1968, some thirty-four (34) days after the arrest and seizure. The chronological proceedings previously set out herein, show the various motions which necessarily precluded an earlier disposition. Certainly, the time required by the appeal process should not be a deciding factor. *Freedman v. Maryland*, 380 U.S. 51, 60 (1965) limited to preservation of the status quo for the shortest, fixed period compatible with sound judicial resolution, any restraint imposed in advance of prompt, final, judicial determination, and *Thirty-Seven Photographs, supra*, suggested a seventy-four (74) day maximum. Petitioner's trial in justice court was held within thirty-four (34) days and a judicial determination entered within thirty-eight (38) days. See *Byrne v. Karalexis*, 401 U.S. 216, 221 (1971) and Mr. Justice Brennan's opinion joined by Mr. Justice White and Mr. Justice Marshall stating, "Freedman was satisfied by a 'prompt judicial decision *by the trial court*' ".

CONCLUSION

Respondent submits on the basis of the foregoing reasons, the ruling and judgment of the Supreme Court of Washington should be affirmed.

Respectfully submitted,

HERBERT H. DAVIS
Prosecuting Attorney

CURTIS LUDWIG, Deputy
Prosecuting Attorney
Counsel for Respondent